Supreme Court, U. S.
FILED
NOV 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-657

Local 3489, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO,
Petitioners,

v.

William J. Usery, Secretary of Labor,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

MICHAEL H. GOTTESMAN
GEORGE H. COHEN
BERLINOFF, CUSHMAN,
GOTTESMAN & COHEN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

CARL B. FRANKEL
ALFRED E. LAWSON
Five Gateway Center
Pittsburgh, PA 15222

OF COUNSEL:

BERNARD KLEIMAN
Suite 1910
One East Wacker Drive
Chicago, Illinois 60601

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

		PAGE
A.	The Secretary Articulates No Standard	2
B.	*Hotel Employees* Did Not Prescribe An "Effects Test" Where The Member Controls His Own Eligibility	4
C.	The Secretary's Fall Back Argument—Shifting The Burden To The Union	7
	Conclusion	12

CITATIONS

CASES:

Brennan v. Local 5724 United Steelworkers of America, 489 F.2d 884 (6th Cir. 1973) 6

Hodgson v. Local 18, International Union of Operating Engineers, 440 F.2d 485 (6th Cir. 1971), *cert. denied*, 404 U.S. 852 (1971) 5, 8

Hodgson v. Local Union 6799, United Steelworkers of America, 403 U.S. 333 (1971) 8, 10

Schultz v. Local 1299, United Steelworkers of America, 324 F.Supp. 750 (E.D. Mich. 1970), *aff'd in part, sub nom.*, Hodgson v. Local 1299, United Steelworkers of America, 453 F. 2d 565 (6th Cir. 1971) 3

United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) 3

Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 U.S. 492 (1968) 2, 4, 5, 8

STATUTES AND REGULATIONS:

29 U.S.C. § 401(e) 3

29 C.F.R. § 452.38 ..... 2, 3, 9

MISCELLANEOUS:

105 Cong. Rec. 6741 (April 25, 1959, remarks of Sen. Morse) 8

S. Rep. No. 187, 86th Cong., 1st Sess. (1959) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-657

Local 3489, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO,
Petitioners,
v.
William J. Usery, Secretary of Labor,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

The Secretary makes two attacks on the Steelworkers' meeting attendance rule. One is the "high" percentage ineligible *per se* approach seemingly relied upon by the court below. The second argues that the validity of a qualification depends on whether the union can demonstrate that it serves legitimate union needs "of the highest order" and that these needs cannot be met by other methods which the Secretary thinks are as or more effective (Br. 22). We respond briefly below.

A. The Secretary Articulates No Standard.

Both of the Secretary's approaches suffer from a common flaw. Nowhere has he formulated a standard by which this Court and the unions governed by the statute can determine the reasonableness of a qualification for candidacy, such as the meeting attendance rule. We start with the knowledge that the Secretary considers it reasonable for a union to establish meeting attendance requirements and that those requirements are designed to obtain candidates with a demonstrated interest in union affairs and who are sufficiently familiar with the problems of the organization (App. 50-55, 29 C.F.R. 452.38). What we cannot ascertain either from the Secretary's brief or his latest regulation[1] is the point at which this otherwise reasonable requirement turns unreasonable. If eligibility percentages are controlling, as the Secretary seems to suggest, what is the minimum? How does a union guess when its rule crosses the line? Similarly, if the length of the attendance measuring period is controlling, what is the dividing line between a lawful and unlawful period? How can it be determined?[2]

---

1. The Secretary describes as "outdated" his regulation sanctioning a rule requiring attendance at half the meetings in a two-year period (Br. 7). We point out that the "old" regulation was in force when the challenged election in Local 3489 was held and is therefore not "outdated" as far as this case is concerned. Moreover, his new regulation (29 C.F.R. § 452.38 (1974)) obviously was not prompted by this Court's decision in *Wirtz v. Hotel, Motel & Club Employees Union, Local 6,* 391 U.S. 492 (1968) inasmuch as it was promulgated some six years after that decision.

2. If the measuring period in the Steelworkers' rule were limited to the last year of the term, the Secretary would, no doubt, assail it as unreasonable by pointing to those members who had faithfully attended during the first two years of the term when the issues in which they were interested were ripe.

These problems in determining reasonableness[3] are compounded by another dilemma. If the union guesses wrong and does not apply a candidacy requirement which it should have, e.g., in the mistaken belief that the as yet undefined line was crossed in a particular local, then it will run afoul of another provision in Section 401(e), 29 U.S.C. § 401(e), which *requires* that "the election be conducted in accordance with the constitution and by-laws of [the union] insofar as they are not inconsistent with the provisions of this subchapter."

This Union's task has not been made easier by the Secretary's repeated flipflop in position with respect to meeting attendance rules and the importance assigned to eligibility percentages in Department of Labor directives (App. 50-55, 29 C.F.R. 452.38). Indeed, in light of these contradictions, the Secretary's most recent view is entitled to no special weight. *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 858, n. 25 (1975).

---

3. The Secretary's case-by-case approach would require each Steelworker local to determine how many of its members were eligible in order to determine whether it met an undefined minimum eligibility percentage. Where there are steady afternoon and rotating shifts, as in basic steel, and local union membership in the 1,000 to 20,000 range, the administrative burden would be impossible. Hundreds of thousands of time cards and other employment records would have to be checked. The Secretary of Labor, with all the investigative resources at his command, did not undertake such a check in a meeting attendance case involving a basic steel local. *Schultz v. Local 1299, United Steelworkers of America,* 324 F.Supp. 750 (E.D. Mich. 1970), *aff'd in part, sub nom., Hodgson v. Local 1299, United Steelworkers of America,* 453 F.2d 565 (6th Cir. 1971).

B. *Hotel Employees* Did Not Prescribe An "Effects Test" Where The Member Controls His Own Eligibility.

In our opening brief (33-37), we showed that the reasonableness of the Steelworkers' meeting attendance rule cannot be made to turn on the percentage of members who choose to comply with it. As the Secretary himself has declared, it would be "less than fair" to attack the rule on that ground. Instead, a candidacy requirement such as the meeting attendance rule is reasonable within the meaning of the statute if it imposes no undue or onerous burden on the member who wishes to become a candidate (it is not *unduly* restrictive) and and it serves legitimate union purposes. If both tests are satisfied, say we, the rule cannot be assailed as unreasonable merely because a "high" percentage of members take themselves out of the running.[4]

The Secretary misreads this Court's decision in *Hotel Employees*. That case did not lay down a hard and fast test based on the percentage qualifying. As we stressed in our opening brief (34-35), the prior office requirement in *Hotel Employees* prevented members from qualifying who wished to do so. Moreover, through the use of appointive powers, incumbent officers there determined who could become eligible for office. The percentage eligible is clearly relevant in determining the reasonableness of such a rule. But the Steelworkers'

4. The Secretary twists our argument beyond recognition (Br. 20-21). The test we urge is not whether it is *possible* for the member to comply but whether he could do so without being subjected to an onerous burden. It is "possible" to satisfy a 100 percent meeting attendance requirement but no one suggests that such a rule would be reasonable.

rule rests control of eligibility in the hands of the member himself. Any member who wishes to make himself eligible can do so by taking the unburdensome step of attending one-half the meetings. The reasonableness of such a rule cannot be determined by the percentage of members who choose not to comply.[5]

The Secretary also misconstrues another leg in our argument. We do not assert that an unburdensome candidacy requirement is reasonable if it serves no valid union purpose. Indeed, we have insisted all along that the meeting attendance rule serves not one but three legitimate union objectives. For that reason, we are surprised that the Secretary relies on *Hodgson v. Local 18, International Union of Operating Engineers,* 440 F.2d 485 (6th Cir. 1971), *cert. denied,* 404 U.S. 852 (1971) in support of his argument on this point (Br. 21, n. 8). The Sixth Circuit which decided *Local 18* later distinguished the double initiation fee requirement there at issue from the Steelworkers' meeting attendance rule as follows:

> ". . . This court invalidated the election in *Local Unions 18*, on the following two-fold reasoning: the union had applied a rule which (1) placed a price tag on a member's right to run for office; and (2)

5. As we have shown, officer control over and the lack of membership self-determination in eligibility were of controlling significance in *Hotel Employees*. The Secretary's assertion (Br. 21) that the cases he cites (*id,* n. 14, 15, 16) "recognize" the contrary is simply not true. With the exception of the one clearly inapposite case discussed above, all these decisions pre-date *Hotel Employees* and unless gifted with prescience, their authors could not have "recognized" what facts this Court would deem controlling in a later decision.

had no bearing on a member's fitness to hold office. 440 F.2d at 487-88. These deficiencies were deemed to be antithetical to the policies of LMRDA. The fact that the Union rule also had the effect of precluding a certain percentage of members, there 60 per cent, from running for office was plainly not the basis of the reasoning of this court.

"We believe that the Steelworkers' rule has a direct, substantial relationship to fiitness to hold office in that participation in union meetings is one indicia of interest in union affairs. Further, it does not place any price tag on the right to be a candidate. As such, the rationale of *Local Unions 18* does not support the Secretary's position here." *Brennan v. Local 5724, United Steelworkers of America,* 489 F.2d 884, 889 (6th Cir. 1973).

One matter on which the Union and the Secretary agree is that Title IV of the LMRDA was designed to cure a specific evil, namely, unduly restrictive election structures which make it impossible to remove entrenched incumbents. That being so, we have shown or offered to prove in the meeting attendance cases that the Steelworkers' rule does not *in fact* preclude election contests or entrench incumbents (Petitioners' Opening Brief, 30-31). The Secretary's entrenchment theories collapse in the face of *facts* showing wholesale changes among officers in Local 3489 and throughout the Steelworkers. Indeed, he has expressly disclaimed any contention that the meeting attendance rule actually operates to perpetuate incumbents or prevent contests (*id,* n. 27). Yet, these facts are a truer measure of whether Steelworker local union officers are entrenched or insulated than the "effects test" offered by the Secretary.

Another measure is the results of the April, 1976 election of Steelworker local union officers. Of 5,303 locals, new presidents were elected in 2,016 (38 percent), new vice-presidents in 2,920 (55 percent), new recording secretaries in 1,892 (36 percent), new financial secretaries in 1,461 (27 percent) and new treasurers in 1,935 (36 percent).

C. The Secretary's Fall Back Argument—Shifting The Burden To The Union.

The Secretary's fall back position is that if the meeting attendance rule is not unreasonable *per se,* it becomes unreasonable unless the union can come forward and prove that the rule serves legitimate "union needs of the highest order" which cannot be met by alternative methods, such as an independent reporter, less objectionable to the Secretary (Br. 22, 25). Once again, no standards are set forth by which a court or unions can determine whether or not a particular candidacy requirement is sufficiently worthy to meet the statute. Instead, the Secretary attempts by this argument to shift the burden which is properly his to the Union.[6]

---

6. There is another attempt to shift the Secretary's burden to the Union (Br. 16, n. 7). On this record, no one can say for certain how many members of Local 3489 were elegible. This is so because when the Department of Labor investigator checked the employer's work records to determine excuse entitlement, he did so for only a handful of members (App. 83-86). In our opening brief (8), we indicated why we believe additional members were eligible. In any case, it is the Secretary who examined the employer's records. More importantly, it is he who alleges that a high percentage of members was ineligible. Accordingly, the burden is his, not ours.

First, nothing in the statute, the legislative history or this Court's decision in *Wirtz v. Hotel, Motel & Club Employees Union, Local 6,* 391 U.S. 492 (1968) suggests that Congress had such a test in mind when it required that candidacy qualifications be "reasonable." Indeed the legislative history seems to foreclose such a result for it makes clear that Congress meant for the unions themselves to design the specific election machinery and procedures which they, rather than Congress or the courts, believed best accommodated the particular needs and circumstances of their own membership, subject, of course, to the broad principle of reasonableness enunciated by the statute. See, S. Rep. No. 187, 86th Cong. 1st Sess. (1959), page 5; 105 Cong. Rec. 6741 (April 25, 1959, remarks of Sen. Morse). This Court has observed that one of the Congressional purposes is to remedy election abuses "without departing needlessly from the long-standing Congressional policy against unnecessary governmental interference with internal union affairs." *Hodgson v. Local Union 6799, United Steelworkers of America,* 403 U.S. 333, 339 (1971).

Second, we submit that a rule which seeks to encourage meeting attendance, particularly by those opposed to the officers, and which seeks to insure that those seeking office have demonstrated an interest in union affairs and have a sufficient working knowledge of the union's affairs and familiarity with its problems to serve the membership and intelligently fulfill the duties of office is a rule which does serve the highest needs of a labor union. It thus stands in marked contrast to a candidacy qualification whose only purpose, as in *Local 18, supra,* is to levy a tax on running for office. Indeed as we pointed out in our first brief (21, 22, 27, 28), the Secretary of Labor has himself acknowledged that

meeting attendance qualifications are a "reasonable means of encouraging participation in the affairs of the union" and are reasonably designed to obtain candidates with "a demonstrated interest in union affairs" and who are sufficiently familiar with the affairs and problems of the organization (App. 50-55). Even in his most recent pronouncements, the Secretary recognizes that it may be reasonable for a union to establish a meeting attendance requirement ". . . in order to insure that candidates have a demonstrated interest in and familiarity with the affairs of the organization . . . ." (Br. 15, 29 C.F.R. 452.38.)

Third, we examine the one measure suggested by the Secretary as an alternative to the meeting attendance rule. While acknowledging the effectiveness of the meeting attendance rule as a restraint on union leaders, he suggests that the use of an independent reporter to record the business transacted at the meeting will do as well by exposing impropriety (Br. 24-25). This suggestion, even if local unions could afford to implement it, is both useless and impractical. The meeting attendance rule is aimed at bringing the opposition to the meetings so that union bargaining policies, grievance processing, political action and the entire range of decisions will be fully debated and not adopted without effective membership control. The presence of an independent reporter will not further these democratic objectives. All a reporter could do is insure accuracy in the minutes of the meeting. That hardly guarantees debate, opposition or membership participation in union decisions. Moreover, unfaithful reporting of meeting business is not often cited as a nagging problem in union government. Accordingly, the presence of an independent reporter serves no useful purpose at all much less as a viable alternative to the meeting attendance requirement.

Finally, the Secretary contends (Br. 28) that the Union "is not faithful to its own premise" because the excuse provision allows members to run for office who had not attended meetings because they were working or were engaged in union activities at the time of the meeting. This contention is, to us, quite startling.[7] We are startled because it is the Secretary who has consistently emphasized that unions with meetings attendance requirements must give credit to those who worked during the meeting.

> "[I]f members must work during the time when meetings are held, a requirement of attendance at a given number of meetings may be unreasonable in its application, when there is not adequate provision for excused absences for members who are working at the time meetings are held."[8]

In short, the union was being faithful to the *Secretary's* own premise, by providing credit to those who worked during meetings.[9] Moreover, disqualifying a whole segment of the membership simply because they must work during meetings would be unreasonable indeed. Members with the opportunity to attend meetings are obviously in a different class than members who are prevented from attending by the necessity to work. The former, having no work conflict which precludes their attendance, have no excuse for failing to attend meetings. The work excuse provision does not thereby become a plum designed to benefit members whose work conflicts with meetings. It is simply an exception to the meeting attendance rule made out of the necessity to enable *every member to qualify,* and indeed, because the Secretary of Labor insists that it be provided.

The meeting attendance rule is thus a reasonable rule designed to achieve legitimate purposes. The work exception is not proof that those purposes are illegitimate, but it is a practical adjustment made to assure that every member is able to qualify for union office. In the Steelworkers Union every member *is* able to qualify.

---

7. This contention was not made in this case until now. The Secretary appears to be quite schizophrenic on the issue. At one point (Br. 17, n. 9), he seems to complain that the excuse provision qualifies too few members. Later (Br. 28), the Secretary carps because it qualifies any at all.

8. Appendix in *Hodgson v. Local Union 6799, United Steelworkers of America,* October Term, 1970, No. 655 at 196-200. For the Court's convenience, these excerpts from the record in *Local 6799* are included in an appendix to this brief.

9. In making this point, the Secretary cites the testimony of his employee to the effect that members don't need meetings to acquire knowledge of the full range of union affairs because they can acquire it at the workplace (Br. 28). On cross examination, however, the employee acknowledged that his views in this regard differ from those of the Secretary (App. 42-43). In any case, most employers, we suspect, believe that the workplace is for work and not for seminars on union affairs.

CONCLUSION

For the reasons set forth above and in our first brief, the decision below should be reversed.

Respectfully submitted,

MICHAEL H. GOTTESMAN
GEORGE H. COHEN
BREDHOFF, CUSHMAN,
GOTTESMAN & COHEN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

CARL B. FRANKEL
ALFRED E. LAWSON
Five Gateway Center
Pittsburgh, PA 15222

OF COUNSEL:

BERNARD KLEIMAN
Suite 1910
One East Wacker Drive
Chicago, Illinois 60601

APPENDIX

APPENDIX

[Defendant's Exhibit O]

Mr. Woodrow W. Donald
539 Coal Street
Prichard, Alabama 36610

October 12, 1967

Dear Mr. Donald:

Your letter to the National Labor Relations Board concerning the imposition by your union of certain qualifications on members seeking election to union office has been referred to this Office for reply. The Office of Labor-Management and Welfare-Pension Reports is charged with the administration and enforcement of certain sections of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA). This Act requires the reporting and public disclosure of the financial affairs and administrative practices of labor organizations and also sets certain minimum standards for the conduct of elections of union officers.

From the facts in your letter, it appears that the members of your local union work on rotating shifts around the clock; that union meetings are held on the first and third Tuesday of the month at 7:00 P.M.; and that the union has established as a qualification for candidacy attendance at fifty percent of such meetings in each calendar year.

Section 401(e) of the LMRDA provides that in an election required by the Act which is held by secret ballot, every member in good standing shall be eligible to be a candidate and to hold office. However, the eligibility of members to be candidates for union office is subject, among other things, to such "reasonable" qualifications

as the labor organization may wish to include in its constitution and bylaws, as long as such qualifications are uniformly imposed on all the members.

The question of whether a particular qualification is reasonable is a matter which often is not susceptible of precise definition. For example, a qualification restricting eligibility for union office to members who meet a requirement involving attendance at a certain number of union meetings during a given period is not an unusual qualification. Ordinarily, such a qualification would be a reasonable means of encouraging participation in the affairs of the union. However, there may be circumstances in which an attendance requirement would not be reasonable. For example, if members must work during the time when meetings are held, a requirement of attendance at a given number of meetings may be unreasonable in its application, when there is not adequate provision for excused absences for members who are working at the time meetings are held.

Since you did not state the name of your union, we were unable to check its constitution and bylaws. Generally, a provision requiring attendance at fifty percent of the union's meetings for a period of one calendar year would not be considered by this Office to be unreasonable. However, if the work shifts are rotated in such a way as to make the effect of the provision one which would require more than fifty percent attendance during the year, serious question would be raised as to the reasonableness of the rule. Thus, if members work on the night shift on eight of the 24 scheduled meeting nights, it would be possible for them to attend a maximum of only 16 of these meetings. Eligibility predicated on attending 12 of these meetings during the year may

under such circumstances not be considered reasonable unless the absences due to night work are excused.

I am enclosing a copy of the Act, the Regulations and Interpretative Bulletins, and the pamphlet, "Electing Union Officers," for your information.

Should you have further questions about the Act, it may be convenient for you to contact our Atlanta Area Office. The address is Room 317, 1371 Peachtree Street, N. E., Atlanta, Georgia 30309. The telephone number is Code 404, 526-5351.

Sincerely yours,
FRANK M. KLEILER
Director

Enclosures

[Defendant's Exhibit P]

October 27, 1967

Honorable Jack Edwards
House of Representatives
Washington, D. C. 20515

Dear Congressman Edwards:

This is in reply to your referral of October 19, 1967, of a letter from a constituent describing rules governing eligibility to run for office in a local union. You have asked the Department of Labor for an opinion on whether the facts stated in this letter constitute a proper basis for action by the Department.

From the facts in your constituent's letter, it appears that his complaint centres around an eligibility qualification in his International Union's constitution and bylaws which requires that a member attend 50% of the local's regular meetings during the six-month period prior to nominations in order for the member to be eligible to be nominated to run for local office. In addition, your constituent complains that a majority of the local members work a rotating shift, thereby making it difficult for the members working during the time of the meeting to satisfy the 50% attendance requirement.

As you may know, Title IV of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), sets forth certain minimum standards for the conduct of elections by union officers. Section 401(e) provides that in an election required by the Act which is held by the secret ballot every member in good standing shall be eligible to be a candidate and to hold office. However, the eligibility of members to be candidates

for union office is subject, among other things, to such "reasonable" qualifications the members of the labor organization choose to embody in their constitution and bylaws, as long as such qualifications are uniformly imposed on all members.

The question of whether a particular qualification is reasonable is a matter which often is not susceptible of precise definition. For example, a qualification restricting eligibility for union office to members who meet a requirement involving attendance at a certain number of union meetings during a given period is not an unusual qualification. Ordinarily such a qualification would be a reasonable means of encouraging participation in the affairs of the union. However, there may be circumstances in which an attendance requirement would not be reasonable. For example, if members must work during the time when meetings are held, a requirement of attendance at a given number of meetings may be unreasonable in its application when there is not adequate provision for excused absences for members who are working at the time meetings are held.

Since we do not know your constituent's name or the name of his union, we were unable to examine the local's constitution and bylaws or the previous election complaint he filed with the Secretary. Generally, a provision requiring attendance at 50% of a union's meetings for a period of six months prior to nominations would not be considered by this Office to be unreasonable. However, if the work shifts are rotated in such a way as to make the effect of the provision one which would require more than 50% attendance during the six-month period, serious question would be raised as to the reasonableness of the rule.

As you can see, it would be impossible on the basis of the information contained in your constituent's letter to give you a definite opinion on whether the facts in his letter constitute a proper basis for action by the Secretary.

The Office of Labor-Management and Welfare-Pension Reports (LMWP) is charged with the administration and enforcement of certain sections of the LMRDA, including the election provisions of Title IV. Pursuant to section 402(a) of Title IV, a union member may request the Secretary of Labor to conduct an examination of his union's election procedures as applied in a particular election if, after the election occurred, he has exhausted all available internal union remedies provided for appealing union election procedures or has invoked these remedies without receiving a final decision within three months. The Secretary may bring suit to have the challenged election set aside if, during his investigation of the member's complaint, he finds probable cause to believe a violation of Title IV of the Act has occurred and that the violation may have affected the outcome of the election.

I hope your constituent will find this information helpful. If he should desire any further assistance or information concerning the LMRDA, please advise him to feel free to contact our Atlanta Area Office which is located at Room 317, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309. The telephone number is Area Code 404, 526-5351.

Sincerely yours,

SAMUEL V. MERRICK
Special Assistant for
Legislative Affairs